No. 83-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

Petitioner,

v.

GREENMOSS BUILDERS, INC.

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Vermont

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF RESPONDENT, GREENMOSS BUILDERS, INC.

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Respondent, Greenmoss Builders, Inc, hereby moves for leave to submit a Supplemental Brief consisting of four pages addressing two issues in the case and in support thereof represents as follows:

1. In drafting its initial brief, Greenmoss was guided by advice, assistance and instructions from its printer that a page of typewritten material would be approximately equivalent to a page of offset printing.

2. In attempting to abide by the Court's 50-page limitation for briefs set forth in Rule 34.3, Greenmoss

excised from the draft of its initial brief the facts and authorities contained in this Supplemental Brief due to space restraints.

3. Greenmoss' initial Brief submitted to the Court comprises forty-three pages in length.

4. The four additional pages of brief set forth in this Supplemental Brief will assist the Court in the factual exposition of the case and explains the calculation and computation of the jury's verdict on compensatory damages. Additionally, the Supplemental Brief provides additional support, drawn from cases already cited in Greenmoss' Brief, for the position that credit reporting agencies have no fear of self-censorship if the constitutional protections outlined in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) are not extended to them.

5. Dun & Bradstreet has filed no reply brief. Further, the within brief is submitted sufficiently in advance of argument so as to avoid prejudice to D & B.

6. The additional material in the Supplemental Brief will increase Greenmoss' Brief to 46 pages. Greenmoss would have incorporated the arguments made in the Supplemental Brief in its initial Brief but for the general guidelines provided by its printer as to the correlation between the typewritten page and the conversion to offset printing.

7. On March 1, 1984, Greenmoss forwarded to Dun & Bradstreet typewritten copies of the within Motion and Supplemental Brief in order to provide D & B with additional advance time to review the points addressed herein.

WHEREFORE, Greenmoss moves that the within Motion be granted and that the Supplemental Brief be accepted and considered by the Court in addition to Greenmoss' initial Brief.

Respectfully submitted,

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SUPPLEMENTAL STATEMENT OF THE CASE

1. The Facts.

D & B's suggestion that the $50,000 compensatory damage award derives from the notion of presumed damages is belied by the evidence on damages and the trial Court's charge on compensatory damages.

The charge on compensatory damages instructed the jury to consider items of lost profit and Greenmoss' expenditures caused by D & B's wrongdoing (J. A. 19). D & B claims that such items only total $36,000 instead of the $50,000 awarded by the jury. This claim fails to consider that the charge also provided the jury the right to award interest on the damages found from the time of injury, July 26, 1976, to the date of the verdict, April 10, 1980. (Tr. 491). Interest could be awarded at the Vermont statutory rates of 8½ percent per annum until July 1, 1979 and then at 12 percent per annum from July 1, 1979 to the date of verdict. (Tr. 491). Even under D & B's calculation of the actual damages at $36,000, consideration and calculation of interest, when added to the damage figure asserted by D & B yields a total compensatory damage figure, as of the date of the verdict, of approximately $50,022.30. This is virtually the amount awarded by the jury for compensatory damages.

Secondly, D & B's analysis of the components of the compensatory award is limited to consideration of lost profits for only a one-year period. Greenmoss introduced evidence that the lost profits in the suceeding year was an additional $42,000. (Tr. 99, 104).

Thirdly, the compensatory damage instructions cautioned the jury that a verdict of substantial damages was not compelled unless Greenmoss proved "that substantial damages *have in fact* occurred." (J.A. 19 empha-

sis added). The next sentence of the charge re-emphasized that compensation to Greenmoss must be related to the damages *actually* caused by D & B. (J.A. 19 emphasis added).

Finally, the trial court expressly limited consideration of compensatory damages to only lost profits and such expenditures as were made by Greenmoss for self help corrections of the falsehood. (Tr. 488). Accordingly, more abstract actual damage elements such as humiliation and impairment of standing in the community comprise no part of the jury's compensatory damage award here. *Cf.* Gertz *supra*, at 350. In this case, any presumed compensatory damages were limited to a nominal amount "such as one dollar". (Tr. 488). D & B does not claim the $50,000 compensatory damage award is nominal.

ARGUMENT

To supplement the arguments made in Section I-B of its initial Brief at pages 30 and 31, Greenmoss submits the following.

Hood v. *Dun & Bradstreet, Inc.*, 482 F. 2d. 25 (5th Cir. 1973) *cert. denied*, 415 U.S. 95 (1974) holds that commercial credit reporting agencies should not be afforded First Amendment protection in defamation cases. In addition to relying upon the commercial speech doctrine, the court in *Hood* doubted that such companies would be inhibited by self-censorship if First Amendment protections were withheld. Because the common law privilege extended to credit reporting agencies is predicated upon the theory that, absent such privilege, such companies would be driven out of business by the cost of defamation suits, the court analyzed the status of credit reporting agencies in jurisdictions that have declined to apply the common law protection.

In Georgia, where credit reporting agencies have no common law privilege, such businesses exist and are thriving. Indeed, the *Hood* court noted that D & B does business in Georgia despite the lack of the privilege and one of the largest credit reporting agencies in the country, Retail Credit Company, is based in Georgia.

The court also referred to a study comparing the activities of credit reporting agencies in Idaho, where no common law privilege exists, with credit agencies in the state of Washington, where the privilege does exist. 482 F. 2d. at 32, n. 18.

The conclusions in that study that no real difference in credit agencies' activities could be perceived in the two states and other factors led the *Hood* court to the conclusion that in those states where there is no conditional privilege, credit information is readily available and there is apparently no inhibition from publishing such reports due to lack of the protection of the privilege.

In short, fears of self-censorship should not be a reason for extending *Gertz* to such defendants especially where there is no evidence whatsoever on this record to suggest

that these unique entities will refrain from publishing their reports about private persons who are not public officials or public figures out of fear of defamation suits. cf. *Gertz, supra.* at 390; (White, J., Dissenting).

Respectfully submitted,

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